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Lim Boo Chang v Ng Wei Aik

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22NCVC-22-01
OF 2012

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S NANTHA BALAN JC
23 SEPTEMBER 2014

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Tort — Defamation — Defences of justification and fair comment — Plaintiff hopped from one political party to another — Plaintiff left Parti Keadilan Rakyat and held press conference and lambasted Democratic Action Party ('DAP') — Defendant defended DAP and called plaintiff 'frog' or 'frog with no human character' — Whether it was defamatory to call or label politician who changed political parties as 'political frog' or 'frog' or 'frog with no human character'

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— Whether words in their usual and ordinary meaning bore or could be understood to bear or capable of bearing any defamatory meaning against plaintiff — Whether words complained of were expression of opinion and fair comment

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The plaintiff had over the years changed from one political party to another. The last political party of which he was a member was the Parti Keadilan Rakyat ('PKR'). He left PKR on 13 December 2011. PKR was part of a coalition known as Pakatan Rakyat ('PR'). The other component party which belonged to PR was the Democratic Action Party ('DAP'). The defendant was a member of DAP. Upon leaving PKR, the plaintiff held a press conference and lambasted the DAP and alleged that it was bullying its PR partners. The press spoke to the defendant, who defended the DAP and repudiated the plaintiff's allegations. In the course of doing so, the defendant also called the plaintiff a 'frog' or 'frog with no human character'. The plaintiff commenced this defamation suit against the defendant for allegedly slandering him through various press statements. Although there was some dispute as to whether the defendant had actually called the plaintiff a 'political frog', it was clear that the word 'frog' was obviously used. The words that the plaintiff complained of were that the defendant labelled him a 'frog with no human character'. The issue that arose in this action for defamation by the plaintiff was whether it was defamatory to call or label a politician who changes political parties as a 'political frog' or 'frog' or 'frog with no human character'. While the plaintiff claimed that the defendant called him a 'frog', the defendant stated and maintained that he first referred to the plaintiff as a 'political frog'. It was the defendant's case that the words 'political frog' and 'no human character' complained of by the plaintiff in their usual and ordinary meaning did not bear, or could not be understood to bear or capable of bearing any defamatory meaning against the plaintiff as alleged. The defendant also maintained that those words were in any event said in jest. The defendant also pleaded justification. Further and in the alternative, the defendant also relied on the

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defence of fair comment. In this respect, the defendant maintained that the words complained of were an expression of opinion and fair comment that the plaintiff was a politician who jumped from one political party to another. In any event, the defendant claimed that he was not actuated by malice in making and publishing statements alleged to be defamatory about and in respect of the plaintiff.

Held, dismissing the claim:

- (1) It was the plaintiff's primary duty to call the reporter to firmly establish who exactly used the words 'political frog' and how it came into the sentence. It was more likely and indeed probable that it was the defendant who used the words 'political frog' which was repeated and posed as a question by the reporter to the plaintiff and in the later part of the article the word 'political' was dropped off. In the Malaysian political context and the propensity or tendency of some politicians to hop or leap from one party to another, the label 'political frog' or 'frog' was not actionable as there was no imputation other than that the individual was a party hopper, which as a fact was true in this case (see paras 123–125 & 128).
- (2) There was no rhyme or reason for the defendant to use the words 'frog' other than for the purpose of conveying that he hopped from one political party to another. He could have but did not use other labels or pick other species of animal from the animal kingdom but confined himself to 'frog'. There was no evidence of any previous animosity between the plaintiff and the defendant. It was not as if the defendant had any axe to grind with the plaintiff. The occasion on which the defendant uttered was one where he had to legitimately rise up to the occasion and defend his party, DAP which was being maligned by the plaintiff. Such conduct was not a manifestation of malice. He had to do it out of necessity so as to disabuse the perception created by the plaintiff's public statement that DAP was bullying its partner in the opposition coalition (see paras 133, 135 & 153–154).
- (3) The defendant did not call the plaintiff an animal but a 'frog with no human character' which at worst means a politician with no human character. Thus, taking into account the context in which it was said, to construe the words 'frog' and/or 'frog with no human character' as meaning an animal would be an interpretation which would be in defiance of logic and common sense. It would be stretching the interpretation of the words beyond the boundary of reasonableness (see para 134).
- (4) The impugned words must be seen in the context in which they were said and the occasion and circumstances in which the defendant uttered those words. It was not the plaintiff's subjective perception that matters but rather it was the impact that it would have on the mind of a reasonable

- A man who was not averse to scandal, that mattered. This was exactly where societal standards, and norms would come into play in the overall objective assessment in order to determine whether the impugned words were capable of the defamatory meanings which the plaintiff said it had. The words 'frog' or 'frog with no human character' or 'political frog' merely conveyed to the reasonable minded Malaysian that the plaintiff was a political party hopper. Most certainly, the reasonable minded Malaysian would not conclude that the defendant was calling the plaintiff an animal (see paras 143–144).

C **[Bahasa Malaysia summary]**

- Plaintiff telah selama beberapa tahun bertukar daripada satu parti politik kepada satu parti lain. Parti politik terakhir yang mana beliau seorang ahli adalah Parti Keadilan Rakyat ('PKR'). Beliau telah keluar PKR pada 13 Disember 2011. PKR adalah sebahagian daripada parti yang dikenali sebagai Pakatan Rakyat ('PR'). Pihak komponen lain yang dimiliki kepada PR adalah Parti Demokratik ('DAP'). Defendan ialah ahli DAP. Selepas keluar daripada PKR, plaintiff telah mengadakan sidang akhbar dan mengecam DAP dan mengatakan bahawa ia bersekutu dengan rakan PRnya. Pihak akhbar telah bercakap dengan defendan, yang membela DAP dan menolak dakwaan plaintiff. Dalam berbuat demikian, defendan juga telah memanggil plaintiff 'frog' atau 'frog with no human character'. Plaintiff telah memulakan guaman fitnah ini terhadap defendan kerana dikatakan telah memfitnahnya secara lisan melalui pelbagai kenyataan akhbar. Walaupun terdapat beberapa pertikaian berhubung sama ada defendan sebenarnya telah memanggil plaintiff 'political frog', adalah jelas bahawa perkataan 'frog' telah digunakan. Perkataan-perkataan yang diadukan plaintiff adalah bahawa defendan telah melabelkannya 'frog with no human character'. Isu yang timbul dalam tindakan ini untuk fitnah oleh plaintiff adalah sama ada ia bersifat fitnah untuk memanggil atau melabelkan seorang ahli politik yang bertukar parti politik sebagai 'political frog' atau 'frog' atau 'frog with no human character'. Di mana plaintiff mendakwa bahawa defendan telah memanggilnya 'frog', defendan menyatakan dan menegaskan bahawa dia pada mulanya merujuk kepada plaintiff sebagai 'political frog'. Ia adalah kes defendan bahawa perkataan-perkataan 'political frog' dan 'no human character' yang diadukan oleh plaintiff dalam maksud lazim dan biasa tidak membawa, atau tidak boleh difahami untuk membawa atau boleh membawa apa-apa maksud berunsur fitnah terhadap plaintiff sebagaimana didakwa. Defendan juga menegaskan bahawa perkataan-perkataan tersebut dalam apa keadaan diungkap secara menyeluruh. Defendan juga mempli justifikasi. Selanjutnya dan secara alternatif, defendan juga bergantung kepada pembelaan komen yang adil. Sehubungan itu, defendan menegaskan bahawa perkataan-perkataan yang diadukan adalah ungkapan pendapat dan komen yang adil bahawa plaintiff adalah seorang ahli politik yang melompat dari satu parti politik kepada parti politik yang lain. Dalam apa keadaan, defendan mendakwa bahawa dia tidak

digerakkan oleh niat jahat dalam membuat dan menerbitkan kenyataan yang dikatakan berunsur fitnah tentang dan berkenaan plaintiff. A

Diputuskan, menolak tuntutan:

- (1) Ia adalah kewajipan utama plaintiff untuk memanggil wartawan untuk membuktikan dengan tegas siapa sebenarnya yang menggunakan perkataan-perkataan 'political frog' dan bagaimana ia menjadi ayat. Ia lebih daripada mungkin dan sememangnya berkemungkinan bahawa ia adalah defendan yang menggunakan perkataan-perkataan 'political frog' yang diulangi dan dikemukakan sebagai satu persoalan oleh wartawan kepada plaintiff dan dalam bahagian akhir artikel perkataan 'political' telah dipotong. Dalam konteks politik Malaysia dan kecenderungan atau kecenderungan sesetengah ahli politik untuk melompat atau menukar dari satu parti ke parti yang lain, label 'political frog' atau 'frog' tidak boleh diambil tindakan kerana tiada tuduhan yang lain selain daripada individu itu merupakan pelompat parti, yang mana adalah fakta yang benar dalam kes ini (lihat perenggan 123–125 & 128). B C D
- (2) Tiada alasan atau sebab untuk defendan menggunakan perkataan-perkataan 'frog' selain daripada bagi tujuan menyatakan bahawa dia telah melompat daripada satu parti politik kepada parti politik lain. Dia boleh tetapi tidak menggunakan label atau memilih specimen binatang lain daripada kumpulan binatang tetapi menghadkan dirinya kepada 'frog'. Tiada keterangan berhubung apa-apa perselisihan antara plaintiff dan defendan. Ia bukan seperti defendan mempunyai apa-apa perselisihan dengan plaintiff. Kejadian di mana defendan berucap adalah di mana dia dengan sah telah bangkit dan membela partinya, DAP yang difitnah oleh plaintiff. Perbuatan sedemikian bukan satu manifestasi yang berniat jahat. Beliau terpaksa berbuat demikian atas keperluan agar membebaskan persepsi yang dibuat oleh kenyataan awam plaintiff bahawa DAP membuli rakan dalam parti pembangkang (lihat perenggan 133, 135 & 153–154). E F G
- (3) Defendan tidak memanggil plaintiff binatang tetapi 'frog with no human character' yang paling teruk bermaksud ahli politik tanpa ciri kemanusiaan. Oleh itu, dengan mengambil kira konteks di mana ia dinyatakan, untuk mentafsir perkataan-perkataan 'frog' dan/atau 'frog with no human character' sebagai bermaksud seekor binatang merupakan tafsiran yang tidak diterima logik atau akal. Ia adalah melampau untuk mentafsir perkataan-perkataan itu melebihi sempadan kemunasabahan (lihat perenggan 134). H I
- (4) Perkataan-perkataan yang dipersoalkan perlu dilihat dalam konteks di mana ia dinyatakan dan kejadian serta keadaan di mana defendan mengungkap perkataan-perkataan tersebut. Ia bukan persepsi subjektif plaintiff yang diambil kira tetapi lebih kepada kesannya terhadap

- A pemikiran seorang yang munasabah yang tidak suka skandal, yang penting. Ini adalah di mana piawaian masyarakat, dan norma mula berperanan dalam keseluruhan penilaian objektif untuk menentukan sama ada perkataan yang dipersoalkan mampu membawa maksud berunsur fitnah sepertimana dikatakan oleh plaintiff.
- B Perkataan-perkataan 'frog' atau 'frog with no human character' atau 'political frog' hanya menyampaikan kepada rakyat Malaysia yang berfikiran munasabah bahawa plaintiff ialah seorang yang suka melompat parti politik. Sesungguhnya, rakyat Malaysia yang berfikiran munasabah tidak akan membuat kesimpulan yang defendan memanggil plaintiff seekor binatang (lihat perenggan 143–144).]
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Notes

For cases on defamation in general, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 353–831.

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Cases referred to

- Berkoff v Burchill and another* [1996] 4 All ER 1008, CA (refd)
- Bre Sdn Bhd & Ors v Tun Datuk Patinggi Hj Abdul Rahman Ya'kub* [2005] 3 MLJ 485, CA (refd)
- E *Datuk Harris Mohd Salleh v Datuk Yong Teck Lee & Anor* [2012] 4 MLJ 372, HC (refd)
- Dato Seri Anwar Ibrahim v New Straits Times Press (M) Sdn Bhd & Anor* [2010] 2 MLJ 492, HC (refd)
- F *Dato Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor* [2014] 4 MLJ 242; [2014] 3 CLJ 560, CA (refd)
- Lim Guan Eng v Utusan Melayu (M) Bhd* [2012] 2 MLJ 394, HC (refd)
- Mohamed Azwan bin Hj Ali v Sistem Televisyen (M) Bhd & Ors* [2000] 4 MLJ 120; [2000] 7 CLJ 498, HC (refd)
- G *Mohd Razali Abdullah v Ooi Chuan Aun @ Jeff Ooi* Guaman Sivil No 22–69 of 2010 (unreported), HC (refd)
- Payne v Sheffield* [1882] 2 EDC 166 (refd)
- Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 2 MLJ 56 (refd)
- H *The Capital and Counties Bank, Limited v George Henty & Sons* (1882) 7 App Cas 741, HL (refd)
- The Straits Time Press (1975) Ltd v The Workers' Party & Anor* [1987] 1 MLJ 186 (refd)

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Legislation referred to

Defamation Act 1957 s 9

M Thayalan (Lim Boo Chang & Co) for the plaintiff.

Lee Khai (SS Tham with him) (Ong & Manecksha) for the defendant.

S Nantha Balan JC:

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INTRODUCTION

[1] In this case, the plaintiff had over the years changed from one political party to another. The last political party of which he was a member was the Parti Keadilan Rakyat ('PKR'). He left PKR on 13 December 2011. PKR was part of a coalition known as Pakatan Rakyat ('PR'). The other component party which belonged to PR was the Democratic Action Party ('DAP'). The defendant was a member of DAP. Upon leaving PKR, the plaintiff held a press conference and lambasted the DAP and alleged that it was bullying its PR partners. The press spoke to the defendant, who not unnaturally defended the DAP and repudiated the plaintiff's allegations. In the course of doing so, the defendant also called the plaintiff a 'frog' or 'frog with no human character'. Although there is some dispute as to whether the defendant had actually called the plaintiff a 'political frog', it is clear that the word 'frog' was obviously used in the context of the circumstances which led to the plaintiff's departure from PKR.

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THE ISSUE

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[2] Thus, the issue that arises in this action for defamation by the plaintiff is whether it is defamatory to call or label a politician who changes political parties as a 'political frog' or 'frog' or 'frog with no human character'.

THE PLAINTIFF

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[3] The plaintiff is an active politician and a practicing lawyer. He was admitted as an Advocate and Solicitor of the High Court of Malaya in 1985 and has been practicing law since then. The plaintiff had been elected as a member of the Penang State Legislative Assembly for two terms, ie from 1995–1999 and from 1999–2004. The plaintiff had also been a councillor of the Penang Island Municipal Council between 1990–1995 and between 2009–2011. The plaintiff is also the legal advisor to several associations and community groups.

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THE DEFENDANT

[4] The defendant is a member of DAP and at the material time, he was the State Assemblyman for KOMTAR, Penang and the Political Secretary to the Chief Minister of the State of Penang and the Secretary of the Penang State DAP.

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[5] The defendant is presently a Member of Parliament for the constituency of Tanjong. He is no longer a member of the Penang State Legislative Assembly

A nor the Political Secretary to the Chief Minister of the State of Penang.

THE PLAINTIFF'S POLITICAL JOURNEY – A CHRONOLOGY

B [6] It is not disputed that the plaintiff had changed political parties several times. The chronology of the plaintiff's involvement in politics is as follows:

- (a) in 1984, he joined Parti Gerakan Rakyat Malaysia ('GERAKAN');
- (b) in December 1999, shortly after he was elected as the State Assemblyman for Datuk Keramat, Penang under GERAKAN's ticket, he left GERAKAN and joined the Malaysian Chinese Association ('MCA') which is another component party of Barisan Nasional ('BN');
- (c) in the 12th General Elections held on 8 March 2008, BN lost the Penang State election to the PR under the alliance of PKR, Parti Islam Se-Malaysia ('PAS') and DAP. In April 2008, the plaintiff left MCA. In June 2008, the plaintiff joined PKR; and
- (d) on 13 December 2011, he left PKR and applied to rejoin GERAKAN the very next day on 14 December 2011. His application to rejoin GERAKAN was rejected.

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THE CLAIM IN DEFAMATION

F [7] The plaintiff commenced this defamation suit against the defendant for allegedly slandering him through various press statements. The press statements were published by the local media which appeared in:

- (a) *Kwong Wah Yit Poh* newspaper dated 18 December 2011 (Bundle B pp 22–26);
- (b) *Nanyang Siang Pao* newspaper dated 20 December 2011 (Bundle B pp 27–30);
- (c) *Malaysiakini* (English version) dated 20 December 2011 (Bundle B pp 31–33);
- (d) *Malaysiakini* (Chinese version) dated 19 December 2011 (Bundle C pp 1–6); and
- (e) *Kwong Wah e-Newspaper* dated 21 December 2011 (Bundle C pp 7–10).

I [8] The impugned statements are pleaded in paras 6–10 of the statement of claim (Bundle A pp 6–11).

[9] In essence, the words that the plaintiff complains of are that the defendant labelled him a 'frog with no human character'.

[10] It is undisputed that the words that the defendant spoke of or about the plaintiff to the various reporters appeared in the following news articles: A

- (a) the *Kwong Wah Yit Poh Chinese* newspaper dated 18 December 2011 (see B pp 22/23–26) (hereinafter referred to as ‘the KWYP article’);
- (b) the *Nanyang Siang Pau Chinese* newspaper dated 20 December 2011 (see B pp 27/28–30) (hereinafter referred to as ‘the NSP article’);
- (c) the *Malaysiakini* online English news portal dated 20 December 2011 (see B pp 31–33) (hereinafter referred to as ‘the Malaysiakini article’);
- (d) the *Malaysiakini* online Chinese news portal dated 19 December 2011 (see C pp 1–2/3–6) (hereinafter referred to as ‘the Malaysiakini Chinese article’); and C
- (e) the *Kwong Wah Yit Poh* online Chinese news portal dated 21 December 2011 (see Bundle C pp 7/8–10) (hereinafter referred to as ‘the KWYP online article’). D

[11] The plaintiff issued two legal notices to the defendant before filing the action (see Bundle D pp 1–2 and 3–4). The first notice dated 19 December 2011 referred to the KWYP article dated 18 December 2011. The second notice dated 21 December 2011 referred to the NSP article dated 20 December 2011 and the Malaysiakini article dated 20 December 2011. E

THE DEFENCE

[12] While the plaintiff claims that the defendant called him a ‘frog’, the defendant states and maintains that he first referred to the plaintiff as a ‘political frog’. It is the defendant’s case that the words ‘political frog’ and ‘no human character’ complained of by the plaintiff in their usual and ordinary meaning do not bear, or cannot be understood to bear or capable of bearing any defamatory meaning against the plaintiff as alleged. The defendant also maintained that those words were in any event said in jest. F G

[13] The defendant also pleaded justification. H

[14] Further and in the alternative, the defendant also relies on the defence of fair comment. In this respect, the defendant maintains that the words complained of are an expression of opinion and fair comment that the plaintiff is a politician who has jumped from one political party to another. I

[15] Further, the defendant contends that the plaintiff’s said conduct and behavior as a politician, who also holds various positions as claimed in paras 3, 11–14 and 20–21 of the statement of claim, is certainly of public interest. (Bundle A pp 3;11–12;15).

- A [16] In any event, the defendant claims that he was not actuated by malice in making and publishing statements alleged to be defamatory about and in respect of the plaintiff as alleged in the statement of claim.

THE PLAINTIFF'S PLEADED CASE

- B [17] The plaintiff has in paras 6–10 of his statement of claim set out the words printed in the five news article referred to above that contain the words that the defendant spoke of or about the plaintiff and which the plaintiff contends are defamatory of him. From paras 5, 15, 18 and 23 of the statement of claim, it is clear that the plaintiff's case is for the slander, ie for the words spoken by the defendant to the various reporters, and for libel, ie for the re-publication of the words in the print and online newspapers.

- D [18] Further, from para 15 of the statement of claim read together with paras 6–10 of the statement of claim, it is clear that the plaintiff was essentially complaining that the defendant repeatedly and maliciously called him a 'frog without human character' and with 'frog character' only and that the plaintiff as a 'frog' cannot engage a lawyer to issue a legal notice and that these words defamed the plaintiff in the manner set out in paras 16–23 of the statement of claim.

- F [19] From para 15 of the statement of claim, it is clear that the plaintiff did not complain about being called a 'political frog'. The plaintiff's complaint is about being called a 'frog without human character' and the innuendo and the inferences from being labelled as such. This is consistent with the two legal notices before action issued by the plaintiff to the defendant. Both notices show that the plaintiff complained about being called a 'frog without human character' and not about being labelled a 'political frog'.

- G THE DEFENDANT'S PLEADED CASE

- H [20] The defendant has denied any malice in the words spoken by him and denies that any of the words were defamatory of the plaintiff (see paras 3, 4 and 13 of the defence). In paras 5, 9, 10, 11 and 12 of the defence, the defendant contended that he called the plaintiff a 'political frog' and has explained why he did so.

- I [21] The defendant also sought to justify what he spoke and has pleaded justification (see para 8 of the defence). In paras 6 and 14 of the defence, the defendant pleaded that all the words 'without human character', 'frog', 'not human' and 'incapable of issuing a legal notice' were spoken in jest.

- [22] The defendant has pleaded fair comment and maintains that he was

merely expressing his opinion without any malice (see paras 8–13 of the defence).

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DID THE DEFENDANT CALL THE PLAINTIFF A ‘POLITICAL FROG’?

B

[23] The plaintiff maintained that the preliminary question of fact that must be settled is whether the defendant did, in fact, call the plaintiff a ‘political frog’ or whether the defendant did, in fact, call and label the plaintiff a ‘frog without human character’.

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[24] According to counsel for the plaintiff there is a subsidiary preliminary question which is whether the words that the defendant used when speaking to the various reporters, in their natural and ordinary meaning and by way of any inference, meant that the plaintiff was a politician who hopped from one political party to another political party.

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[25] In this regard, the plaintiff in his evidence maintained that the defendant did not utter the word ‘political frog’ (see notes of evidence pp 3, 11–12, 17–18 and 20)

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[26] On the other hand the defendant in his evidence in court vehemently maintained that he did utter the word ‘political frog’ (see notes of evidence pp 26–27, 29–31, 39, 43 and 59). He went so far as to say that he could not stop reporters from shortening the word ‘political frog’ to ‘frog’.

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[27] But during cross-examination the defendant agreed that all the words attributed to him in the various news articles were the words actually spoken by him to the reporters (see notes of evidence pp 2, 33–37 and 47–50). The defendant admitted that he did publish those words to the various reporters.

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[28] As such, the thrust of the plaintiff’s complaint in this action is that from 17 December 2011 onwards, the defendant repeatedly called the plaintiff a ‘frog without human character’.

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[29] Counsel for the plaintiff emphasised that the defendant repeatedly used the word ‘frog’ and ‘no human character’ and that the defendant did not at all use the word ‘political frog’.

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[30] Further, it was submitted on behalf of the plaintiff that in the context of the repeated use of the words ‘frog’, ‘no human character’ and ‘how can a frog issue a legal notice’ without any reservation, the words used by the defendant cannot be about any politician or any ‘political frog’ because a ‘politician’ or a ‘political frog’ has to be a human being.

- A** [31] According to the plaintiff, the defendant was not saying that the plaintiff was a politician who hopped from party to party. Rather, the defendant repeatedly and blatantly ridiculed the plaintiff as a 'frog without human character'.
- B** [32] Lastly, it was submitted for the plaintiff that the defendant's case that he used the words 'without human character' in jest contradicts the defendant's case that he called the plaintiff a 'political frog'.
- C** [33] According to the plaintiff, a 'political frog' must be a politician who is a human being and all human beings will have human character. On that analysis, it was contended that the word 'frog' is consistent with 'no human character'. And so, the plaintiff maintains that the defendant called, wanted to call and meant to call the plaintiff a 'frog without human character'. Thus
- D** counsel for the plaintiff submitted that the phrase 'political frog' and the question of interpretation of that phrase is irrelevant for the purposes of this case as all the words uttered and used by the defendant had nothing to do with the phrase 'political frog'.

E THE IMPUGNED WORDS

[34] At the outset, it is imperative that the impugned words be clearly identified. The impugned words that were spoken by the defendant to the reporters and later re-published in the various print and online media are as follows:

- F**
- (a) the KWYP article:
- G** 'Mengenai percakapan dalam temubual Lim Boo Chang dalam Kuliah Pedas' yang mengatakan beliau sebagai 'katak politik' merupakan pembunuhan perwatakan terhadap beliau, Ng Wei Aik yang pernah berkata bahawa Lim Boo Chang merupakan katak juga tidak kisah langsung, dan bercakap dengan terus-terang bahawa Lim Boo Chang telah tidak mempunyai perwatakan manusia lagi, manalah terdapatnya pembunuhan perwatakan manusia?
- H** Lim Boo Chang hanya mempunyai 'perwatakan katak' dan tidak ada perwatakan manusia, oleh itu langsung tidak timbulnya pembunuhan perwatakan manusia.
- I** Ng Wei Aik juga berkata bahawa beliau langsung tidak merasa sayang pun mengenai penarikan diri Lim Boo Chang dari Parti PKR kerana Parti PKR tidak perlukan ahli parti yang tidak mempunyai perwatakan (B p 26).
- (b) the NSP article
- Mengenai perkara samada beliau telah menerima surat peguam daripada Lim Boo Chang, Ng Wei Aik berkata bahawa 'bolehkah katak mengeluarkan surat

peguam? Semasa ditemubual oleh akhbar kami.

A

Hanya manusia boleh mengeluarkan surat peguam, macam mana katak boleh mengeluarkan surat peguam?

Ng Wei Aik tidak mahu menjawab dengan terus-terang mengenai samada beliau telah terima surat peguam Lim Boo Chang, dan bagaimana beliau akan urus surat peguam berkenaan, beliau hanya tak henti-henti bertanya balik bahawa macam mana katak boleh lantik peguam untuk mengeluarkan surat peguam (B pp 29–30).

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(c) the Malaysiakini article:

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When contacted, Ng said he has yet to receive any legal notice from 'either human or *katak* (frog).

How can a *katak* (frog) engage a lawyer to give me legal notice?' he queried sarcastically (B p 31).

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(d) the Malaysiakini Chinese article:

Mengenai ini, semasa ditemubual oleh Malaysiakini, Ng Wei Aik berkata bahawa sehingga kini masih belum terima surat peguam sesiapa atau pun mana-mana 'katak'. Beliau bertanya balik bahawa macam mana katak boleh lantik peguam untuk mengeluarkan notis.

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Beliau menyindir bahawa Pakatan tidak perlukan ahli parti yang tidak mempunyai perwatakan manusia (C p 6).

(e) the KWYP online article

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Saya tidak terima surat peguam dari sesiapa ataupun mana- mana katak (C p 9).

DID THE IMPUGNED WORDS CONVEY A DEFAMATORY MEANING

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[35] The imperative primary question in an action for defamation is whether the words complained have a meaning which is defamatory of the plaintiff.

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[36] In *Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 2 MLJ 56, Mohamed Azmi J formulated the test at p 58 of the judgment as follows:

Thus, the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true. Another test is: would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally? The typical type of defamation is an attack upon the moral character of the plaintiff attributing crime, dishonesty, untruthfulness, ingratitude or cruelty.

I

A [37] In *Bre Sdn Bhd & Ors v Tun Datuk Patinggi Hj Abdul Rahman Ya'kub* [2005] 3 MLJ 485, the Court of Appeal stated at p 490 of the judgment that the impugned words would be defamatory if they were capable of or had the tendency to affect the minds of the reasonable man in the manner as identified as follows:

B [10] In coming to his findings we are of the opinion that the learned judge had adopted the correct test ie whether the words complained of were calculated to expose the plaintiff to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower the plaintiff in estimation of right thinking members of society generally, (see *JB Jeyaretnam v Goh Chok Tong* [1985] 1 MLJ 334; *Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Bhd & Anor* [1973] 2 MLJ 56 at p 58).

D [38] Counsel for the plaintiff relied upon the case of *Mohd Razali Abdullah v Ooi Chuan Aun @ Jeff Ooi* (Mahkamah Tinggi Pulau Pinang Guaman Sivil No 22-69 Tahun 2010), decided by YA Tuan Vazeer Alam Mydin Meera JC who opined that words uttered by a person of high standing are more likely to be taken seriously and as such have a greater propensity to have an impact on the minds of the reasonable man.

E [39] In his grounds of judgment His Lordship had stated as follows at p 14:

F [20] What more when the person giving that label is a law maker and a person in high office occupying a position of authority, such as the defendant. In construing whether a statement is defamatory, the court can and often does consider the standing and position of the person making it – the case of *Raja Segaran all S Krishnan v Bar Council Malaysia & Ors* [2004] 1 MLJ 34 ...

G [40] It was submitted, quite rightly, that in the present case, the words complained of were published by a person holding high office. The defendant was a law maker and the Political Secretary to the Chief Minister of the State of Penang. According to the plaintiff, the defendant knew that he was speaking about the plaintiff to the members of the press and that whatever he said to the reporters about the plaintiff would be reported in the news, especially in view of the defendant's public office as Political Secretary to the Chief Minister (see notes of evidence p 28).

H [41] Counsel for the plaintiff was at pains to emphasise that the plaintiff is a senior lawyer of many years standing, a former member of the Penang State Legislative Assembly and a former local government councillor. The plaintiff is also the legal advisor to numerous associations (see notes of evidence pp 28-29). The plaintiff is a person of high standing in society.

[42] Counsel submitted that the defendant called the plaintiff a 'frog without human character' and had even said that there was no question of

character assassination as the plaintiff only had 'frog character' and no human character. Upon threat of legal action by the plaintiff, a lawyer, the defendant repeated the 'frog' label and repeatedly asked how a 'frog' can engage a lawyer to give a legal notice.

A

[43] In his attempt at establishing that the words complained of were intended to ridicule the plaintiff, counsel for plaintiff referred to the English Court of Appeal case of *Berkoff v Burchill and another* [1996] 4 All ER 1008. In that case a well-known actor, director and writer was referred to as 'hideously ugly' in a newspaper article. My attention was drawn to the following passage from the judgment of Neill LJ at p 1018:

B

C

It is trite law that the meaning of words in a libel action is determined by the reaction of the ordinary reader and not by the intention of the publisher, but the perceived intention of the publisher may colour the meaning. In the present case it would, in my view, be open to a jury to conclude that in the context the remarks about MrBerkoff gave the impression that he was not merely physically unattractive in appearance but actually repulsive. It seems to me that to say this of someone in the public eye who makes his living, in part at least, as an actor, is capable of lowering his standing in the estimation of the public and of making him an object of ridicule.

D

E

[44] In the same case, Phillips LJ stated as follows at p 1021:

Ridicule

The class of cases where it has been held defamatory, or potentially defamatory, to damage a plaintiff's reputation by exposing him to ridicule is too elusive to encapsulate in any definition ...

F

...

...

G

There are many ways of indicating that a person is hideously ugly, ranging from a simple statement of opinion to that effect, which I feel could never be defamatory, to words plainly intended to convey that message by way of ridicule. The words used in this case fall into the latter category ...

H

[45] Thus, it was submitted for the plaintiff that, viewed objectively, the words complained of clearly had the tendency of exciting against the plaintiff the adverse opinion of right-thinking members of society generally.

[46] It was submitted that the defendant equated the plaintiff to a 'frog'. Counsel emphasised that no one might believe the words uttered by the defendant and republished in the print and online newspapers but the way and manner in which the defendant conveyed his words show that the defendant plainly intended to convey that message by way of ridicule.

I

- A [47] According to counsel, the defendant also subjected the plaintiff to repeated odium, contempt and ridicule by suggesting that the plaintiff, who was himself a lawyer, was incapable of even engaging a lawyer to issue a legal notice against the defendant.
- B [48] The plaintiff had made it public from the outset that the legal notice was issued by his own law firm (see B pp 28 and 31). The defendant repeatedly uttered the words to the effect that the plaintiff, who runs his own law firm, was a 'frog' incapable of even sending a legal notice. According to counsel, the defamatory words used by the defendant have injured the plaintiff's reputation in his profession.
- C

JUSTIFICATION

- D [49] The defendant in his pleading and in his evidence attempted to justify calling the plaintiff a 'political frog'. The defendant said that the plaintiff had hopped from one party to another and so he was a 'political frog'. In this regard, counsel for the plaintiff submitted that this is a non-issue as the defendant actually called the plaintiff a 'frog without human character' and not a 'political frog'. Counsel said that the defendant has not attempted to, and in fact cannot, justify calling the plaintiff a 'frog without human character'.
- E

- F [50] Counsel for the plaintiff submitted that when a defendant relies on the defence of truth and justification, he must prove that the words used are the truth or substantially the truth and that he was justified in using the words (see *Mohd Razali Abdullah* pp 14–15 and *Dato Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor* [2014] 4 MLJ 242; [2014] 3 CLJ 560 pp 572–576). As such, counsel for the plaintiff said that the defence is a non-starter.

G MALICE

- [51] The defendant has denied malice in any of the words spoken by him.
- H [52] It is trite, that malice will defeat the defence of fair comment. On the issue of malice, counsel for the plaintiff referred to the following cases:
- (i) *Datuk Harris Mohd Salleh* pp 388–399;
 - (ii) *Dato' Seri Mohammad Nizar bin Jamaluddin* pp 577–580; and
 - (iii) *Lim Guan Eng v Utusan Melayu (M) Bhd* [2012] 2 MLJ 395 pp 411–418.
- I

[53] There are of course various legal definitions to the words 'malice', but it is sometimes helpful to go back to the ordinary meaning of the word in

question. Thus, for present purposes the appropriate definition of the word 'malice' is 'the desire to do harm to someone' (see *Concise Oxford English Dictionary*, 11th Ed).

A

[54] In *Dato Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor* [2014] 4 MLJ 242; [2014] 3 CLJ 560, the Court of Appeal stated that malice is a state of mind and that unless there is an express admission, the presence of malice can only be deduced or inferred from the circumstances obtaining in each case (see p 577).

B

[55] In the present case, the plaintiff maintains that the defendant repeated the injurious falsehood because the defendant was angry that the plaintiff attacked the political party that the defendant belonged to, ie DAP.

C

[56] The defendant in cross-examination agreed that he uttered the words complained of to defend his party (see notes of evidence pp 50 and 61).

D

[57] Thus counsel for the plaintiff submitted that the totality of the evidence shows that the defendant was actuated by malice, spite and an improper motive when he repeatedly called the plaintiff a 'frog'. The defendant initially called the plaintiff a 'frog without human character' and when threatened with a legal notice by the plaintiff, the defendant called the plaintiff a 'frog' incapable of engaging a lawyer. It is said that the defendant was motivated by malice to completely ridicule and humiliate the plaintiff for attacking his party.

E

WORDS SPOKEN IN JEST

F

[58] In this regard, counsel for the plaintiff contended that the defendant uttered the words with malice and as such the words complained of could not have been spoken in jest.

G

[59] Secondly, counsel said that if we look at the words actually spoken by the defendant and as published in the news articles, it will be seen that the words were not spoken in jest.

H

[60] In this regard, counsel for the plaintiff referred to the KWYP article, where the defendant had explained why there was no issue of character assassination. As such, counsel says that the words 'no human character' could not have been said in jest and that the defendant knew what he was saying and he intentionally chose the words he uttered.

I

[61] In seeking to repudiate the suggestion that the impugned words were said in jest counsel for the plaintiff submitted that the NSP article, the Malaysiakini article, the Malaysiakini Chinese article and the KWYP online

- A article all contained the defendant's response to the plaintiff's first legal notice and that the defendant spoke to the reporters individually and separately. As such, he says that it is unbelievable that the defendant spoke in jest and used the same words to the several reporters.
- B [62] Counsel for the plaintiff further maintained that the circumstances show that the defendant chose his words and intentionally used those words. The defendant's intention was to humiliate and ridicule the plaintiff for sending the legal notice. The defendant knew that the plaintiff was taking the matter seriously. The defendant chose his words and repeated them to several
- C reporters purely to humiliate and ridicule the plaintiff. There is absolutely no question of the words in the news articles being spoken in jest.
- D [63] Lastly, it was submitted that none of the news article reported that the defendant spoke in jest or was joking or laughed when he spoke to the reporters. The following quotes from the news article are significant:
- (a) 'Ng Wei Aik ... juga tidak kisah langsung dan bercakap dengan terus-terang ...' (the KWYP article – B p 26);
- E (b) 'beliau hanya tak henti-henti bertanya balik ...' (the NSP article – B p 30); and
- (c) '... he queried sarcastically' (the Malaysiakini article – B p 31).
- F [64] Based on the above quotes counsel for the plaintiff submitted that the defendant was not speaking in jest and that the quotes actually show that the defendant was malicious and full of spite when he spoke to the reporters.

FAIR COMMENT

- G [65] As for fair comment, counsel for the plaintiff maintained that this defence is not available to the defendant as he spoke the words complained of with malice (see H 2 above) (see also *Datuk Harris Mohd Salleh* at pp 389/390–para 38). He said that for the defence of fair comment to apply, it
- H must be shown that the words used were comments and not statements of fact and further, that the comments are based on true facts. Further, the comments expressed must be fair. Counsel says that the defendant here cannot show any of these.
- I [66] Lastly on this point, counsel submitted that:
- (a) words like 'frog', 'no human character', 'only frog character' and 'frog cannot engage lawyer' are all statements of fact and not comments;
- (b) all words complained of are not true; and

(c) the words complained of are definitely not fair.

A

[67] as such, it was submitted for the plaintiff that the defence of fair comment is unmaintainable.

IMPACT ON THE PLAINTIFF'S REPUTATION

B

[68] As for the impact on the plaintiff, it was submitted that the plaintiff has led evidence in court on how the defamatory words affected his reputation (see notes of evidence p 16, PW1A paras 8, 16–17 and PW1B paras 1–3). The plaintiff's claim is for damages in slander and libel. The plaintiff submits that the factors stated in the paragraphs below must be taken into account in assessing damages in the present case.

C

[69] The plaintiff has a high standing in society. The plaintiff is a senior lawyer, a former State Assemblyman, a former councillor and a community leader. It was emphasised that during the cross-examination of the plaintiff, it was not put to him that he does not have any reputation worthy of being defamed.

D

[70] Also, counsel emphasised that the defendant held high political office. He knew that the words he spoke to the reporters will be published in the newspapers and the words were, in fact, published. The *Kwong Wah Yit Poh* and the *Nanyang Siang Pau* are Chinese daily newspapers that are extensively read. The online newspapers have limitless readership.

E

F

[71] According to counsel for the plaintiff, the defendant called the plaintiff a 'frog without human character'. The defendant outrightly called the plaintiff an animal. The natural and related consequential meanings of having labelled as such are obvious. The defendant ridiculed, humiliated and debased the plaintiff. The plaintiff's reputation was definitely damaged. The defendant repeatedly said that the plaintiff, a senior lawyer, was a 'frog' incapable of issuing a legal notice.

G

[72] It was submitted that the repeated words definitely injured the plaintiff in his profession. It is a fact that issuing a legal notice is the most elementary work that a lawyer does. The defendant repeatedly suggested that the plaintiff was not capable of doing the most elementary work that lawyers do. The defendant, in effect, called the plaintiff a 'useless lawyer'.

H

I

[73] The defendant continued to call the plaintiff a 'frog' despite the plaintiff's legal notice. The defendant, in fact, insulted and snubbed the plaintiff for issuing the legal notice. The defendant repeated his insulting remarks to several reporters.

A [74] It was pointed out that despite receiving two legal notices, the defendant did not tender any apology to the plaintiff. The defendant has not tendered any apology until now.

B [75] Further, it was submitted that the defendant's contention that he actually meant to call the plaintiff a 'political frog' is not borne out by any evidence. The defendant knew that he could have asked the newspapers to do a correction or clarification as to what he actually meant to say to the reporters but the defendant did not make any attempt to do any correction or clarification. The defendant did not send any letter to the plaintiff stating that he actually meant to call the plaintiff a 'political frog' only (see notes of evidence pp 44–45 and 55).

D [76] And so, it was submitted that the entire conduct of the defendant shows that he was motivated by malice when he spoke of the plaintiff to the reporters. The defendant wanted to score political points within his party by humiliating and ridiculing the plaintiff for daring to speak against his party. There was an indirect political advantage which the defendant had gained by attacking the plaintiff in the public arena.

E CASE FOR THE DEFENCE

The words 'political frog' and 'frog' – not defamatory

F [77] As stated earlier, it is the plaintiff's case that the defendant called him a 'frog'. On the other hand, the defendant consistently maintained that he first called the plaintiff a 'political frog'. The first press statement that started the whole episode was contained in *Kwong Wah Yit Poh's* report dated 18 December 2011 (B 22–26) with the title 'Kalau Mahu Pergi, Pergilah Sahaja, Jangan Cari Alasan'.

H [78] This report contained the responses of leaders of PR against the plaintiff's public announcement of his reasons for quitting PKR to rejoin GERAKAN. The plaintiff took offence to the words 'Lim Boo Chang is a 'frog', 'Lim Boo Chang no longer has human character, how can there be human character assassinations' spoken by the defendant. In this report, there are two parts to the defendant's statements. One is titled and translated as 'Ng Wei Aik: Mereka Fakta' and the other part is 'Hanya ada perwatakan katak, tidak ada perwatakan manusia'. They were all made in the same interview by the reporter from *Kwong Wah Yit Poh*, Mr Chew Seng Tung.

[79] Counsel for the defendant said that the circumstances leading to the statements being made by the defendant are material. With regard to 'Ng Wei Aik: Mereka Fakta', it was made in respect of the plaintiff's resignation from PKR on 13 December 2011. A

[80] In his public announcement, the plaintiff lashed out at DAP and claimed that his main reason for quitting PKR is that the DAP had tried to wrestle away three state assembly seats from PKR. He was reported to have said that DAP bullied and oppressed PKR. He was also reported to have denounced DAP in his quitting announcement for being arrogant and abusive due to it having a huge majority of 19 seats in the Penang State Legislative Assembly. B C

[81] He also slammed the Penang Island Municipal Council ('MPPP') for having lost its autonomy allegedly due to the Chief Minister having intervened in its decisions many times. The defendant, who is the Penang State Secretary of DAP was then asked by the *Kwong Wah Yit Poh's* reporter Mr Chew to respond to these allegations made by the plaintiff. D

[82] The defendant felt strongly about the plaintiff disparaging DAP in the public in the course of him quitting PKR. In defending his party the defendant told the reporter that the plaintiff's allegations against DAP were unfounded and were all fabricated. E

[83] In particular, the plaintiff's allegation that DAP tried to grab PKR's seats is untrue, as the decision on the allocation of seats has to be made by the leadership of both parties jointly, and there was no such talk initiated in the first place. This was confirmed by the Deputy Chairman of PKR Penang, Yang Berhormat Law Choo Kiang, who is also the Speaker of the Penang State Assembly, in the same report (B pp 23–24). F G

[84] The plaintiff's allegation was rebutted further and proved to be false when PKR contested 16 seats in the 2013 General Election, which is the same number of seats contested by PKR in the 2008 General Election.

[85] The statements in the article subtitled 'Hanya ada perwatakan katak, tidak ada perwatakan manusia' (B p 26) were made in the same interview. The same reporter asked the defendant to comment on plaintiff's claim made in an earlier interview titled 'Bilik Kuliah Pedas' that it is a character assassination to call him a 'political frog'. H I

[86] The defendant who had called the plaintiff a 'political frog' before responded in jest that the plaintiff only has 'frog' characteristics and not human characteristics, therefore there is no issue of character assassination.

A [87] In his testimony, the defendant consistently maintained that he called the plaintiff a 'political frog' due to his act of jumping from one political party to another party. This is supported by the fact that the reporter only sought the defendant's response to the plaintiff's claim that calling him a 'political frog' is a character assassination. The relevant *Kwong Wah Yit Poh* report at B p 26
B reads:

C Mengenai percakapan dalam temubual Lim Boo Chang dalam 'Bilik Kuliah Pedas' yang mengatakan beliau sebagai 'katak politik' merupakan pembunuhan perwatakan terhadap beliau, Ng Wei Aik yang pernah berkata bahawa Lim Boo Chang merupakan katak juga tidak kisah langsung, dan bercakap dengan
D terus-terang bahawa Lim Boo Chang telah tidak mempunyai perwatakan manusia lagi, manalah terdapatnya pembunuhan perwatakan manusia

E [88] According to counsel, the word 'katak' ('frog') in '... Ng Wei Aik yang pernah berkata bahawa Lim Boo Chang merupakan katak ...' is obviously a second mention of the phrase 'political frog'. In this regard, it is also submitted that all subsequent mention of the word 'frog' in this entire episode which appeared at B pp 28–33, C pp 1–10 clearly also refers to the defendant's labelling of the plaintiff as a 'political frog'. They are all obviously a second
F mention and a shortening of the phrase 'political frog'.

G [89] Hence, it was submitted that there is no reason for the defendant to call the plaintiff a 'frog' out of nowhere. Based on the circumstances and the context in which the words were said, the defendant clearly meant 'political frog'. It was also submitted that there is no difference between the word 'frog' and 'political frog' when they are used in the Malaysian political context, which is the case here. There is no definition of the phrase 'political frog' in any English dictionary. The word 'frog' in any dictionary also does not carry any derogatory meaning. It was submitted by counsel for the defendant that the
H phrase 'political frog' or 'frog' when used in the political arena is not defamatory.

I [90] The phrase 'political frog' is just a term commonly used in Malaysian politics to describe a politician who jumps or switches from one political party to another. The word 'frog' is used in this context as frog is known for its ability to jump (see p 2 DW1A).

The legal test

I [91] The basic test of whether the impugned words are defamatory is whether the impugned words have the effect of lowering the estimation of the plaintiff in the mind of the reasonable man by attacking his moral character. The circumstances in which they were spoken and the context in which they appear must be considered. It is not enough that listeners actually take the

words in a defamatory sense, for they must be reasonably justified in so understanding the words before they are found to be defamatory. Counsel referred to the following quotation from the case of *The Straits Time Press (1975) Ltd v The Workers' Party & Anor* [1987] 1 MLJ 186 (at p 189 para G)

A

... As Lord Selborne LC said in *The Capital and Counties Bank, Limited v George Henty & Sons* (1882) 7App Cas 741 p 745:

B

The test, according to the authorities, is, whether under the circumstances in which the writing was published, reasonable men, to whom the publication was made, would be likely to understand it in a libellous sense.

C

It may be that some persons might have understood the words complained of as conveying an imputation of dishonest, corrupt or false publication by the plaintiffs in their newspaper, but that is not enough: see the judgment of Lord Halsbury LC in *Newill v Fine Art and General Insurance Company* [1897] AC 68, 73 ...

D

[92] Counsel for the defendant also submitted that calling the plaintiff, who is a politician, a 'political frog' itself does not carry negative connotation. This is unlike calling him a 'rat' or 'snake'. It does not cast any attack on his moral character. It also does not implicate the plaintiff of committing any crime. There is no evidence that the impugned words have the effect of lowering the estimation of the plaintiff in the mind of the reasonable man.

E

[93] The words were made by the defendant during an interview with the reporter from *Kwong Wah Yit Poh* and in response to the plaintiff's lashing out at DAP. In defending his party, the defendant refuted the plaintiff's allegation as baseless and having been fabricated. He then labelled the plaintiff as a 'political frog' for again switching political party.

F

[94] Counsel submitted that in the circumstances and context it is clear that the words were meant as words of heat in retort to plaintiff's attack and should be taken as such by the ordinary men. It is also clear that when the impugned words were made, it is purely directed to the plaintiff's capacity as a politician and in reference to his party hopping act. There was no reference or any imputation made to the plaintiff's conduct with reference to him being a lawyer.

G

H

[95] According to counsel for the defendant, an ordinary reasonable person will not understand the phrase 'political frog' in their natural and ordinary meaning or by innuendo to have the meanings alleged in para 15 (a)–(s) of the statement of claim (A pp 12–14), to wit:

I

- (a) that the plaintiff is not a human;
- (b) that the plaintiff is not qualified to be a human;

- A (c) that the plaintiff does not have human character;
- (d) that the plaintiff is a frog;
- (e) that the plaintiff only has frog character and does not have human character;
- B (f) that the plaintiff is not qualified to be capable of human character assassination as he does not have human character that must be possessed;
- (g) that the plaintiff does not have positive values which must be possessed as a human;
- C (h) that the plaintiff does not have human morality;
- (i) that the plaintiff does not have human dignity;
- (j) that the plaintiff does not have human integrity;
- D (k) that the plaintiff does not have human spirit;
- (l) that the plaintiff does not have outward and inward human traits;
- (m) that the plaintiff is not qualified and capable to appoint a lawyer to issue a lawyer's letter because he is not human;
- E (n) that the plaintiff is not qualified and capable to be, act and carry out his duty as an Advocate and Solicitor of Malaya to issue a lawyer's letter even though he has professional qualifications;
- F (o) that the plaintiff is not trustworthy and could not be trusted;
- (p) that the plaintiff does not have and is not qualified to have a good position in the society;
- (q) that the plaintiff can be humiliated and defamed publicly, and the person doing so will not face any legal consequences; and
- G (r) that the plaintiff does not have any value as a human; and that the plaintiff is not worth to be indemnified.

- H** [96] Counsel for the defendant said that the meanings attributed by the plaintiff from the words complained of are obviously the product of some strained or forced or utterly unreasonable interpretation and should be rejected by this court. Thus it was submitted that the only inference that an ordinary reasonable person will draw from the words 'political frog' or 'frog' used in the context of Malaysian politics is that the plaintiff hopped from party to party, which is not defamatory.
- I**

'Frog with no human character' – whether spoken in jest

[97] The plaintiff at paras 7–9 of the statement of claim (A 7–8) alleged that

- the defendant defamed him with statements about him being a ‘frog’ and of ‘no human character’ as reported in *Nanyang Siang Pau* (20 December 2011), *Malaysiakini* English section (20 December 2011), *Malaysiakini* Chinese Section (19 December 2011) and *Kwong Wah e-Newspaper* (21 December 2011). The circumstances of which the words were said were that the words spoken in the first *Kwong Wah Yit Poh* report dated 18 December 2011 (B pp 22–26) titled ‘Kalau Mahu Pergi, Pergilah Sahaja, Jangan Cari Alasan’ were made in reply to the plaintiff’s allegation that whoever called him a ‘political frog’ is committing character assassination against him. A
- [98] The defendant who had called him a ‘political frog’ before, only responded in jest by saying that since ‘frog’ has no human characteristic therefore there is no issue of ‘human’ character assassination. B
- [99] After the first report at B pp 22–26 titled ‘Kalau Mahu Pergi, Pergilah’ was published, the plaintiff on 19 December 2011 in a statement to the press publicly announced that he had issued a legal notice to the defendant. C
- [100] Following this, the reporters from *Nanyang Siang Pau* and *Malaysiakini* separately telephoned the defendant and asked whether he had received any legal notice from the plaintiff. At that time the defendant had yet to receive the legal notice personally and again in jest quipped that he did not receive any legal notice from any human or ‘frog’. This was made in the same context when the defendant called him a ‘political frog’ after his resignation from PKR. D
- [101] On 21 December 2011, the defendant was called up by a reporter from *Kwong Wah Yit Poh*. He was asked to comment on the plaintiff’s accusation that the defendant had defamed him and about his failure to retract the statement within the given 24 hours, and that the plaintiff will sue him in the High Court. E
- [102] In response to the interview through telephone, the defendant commented that if the plaintiff wanted to sue him for defamation, the notice of demand should be given to him personally. As he has yet to receive the notice, he jokingly told the reporter that he did not receive any legal notice from anyone or ‘frog’. This again was clearly made in the same context as when the defendant earlier called him a ‘political frog’. F
- [103] Counsel submitted that the words ‘no human character’ is not defamatory. By saying that the plaintiff is a ‘frog with no human character’ under the circumstances and context of this case will not expose the plaintiff to hatred, contempt or ridicule. It will not cause the plaintiff to be shunned or avoided. G
- H
- I

A [104] As such, counsel submitted that there was no serious imputation cast upon the plaintiff. It was further submitted by counsel for the defendant that the words 'no human character' spoken by the defendant were clearly spoken in jest. Any ordinary reasonable person will understand that the defendant was merely teasing the plaintiff. No ordinary reasonable person will take it seriously and think that the plaintiff is not a human or has no human characteristics or that the words have or would convey the meanings alleged in para 15(a)–(s) and 16 of the statement of claim (A pp 12–14).

C [105] In this case, the defendant's statements clearly only ridiculed the plaintiff of his party hopping action but did not expose him to ridicule by attacking his morality or reputation.

D [106] It was also submitted that even when words which on the face are defamatory, they may nevertheless not be so, when spoken in jest by the defendant, and so understood by anyone who hears them. When spoken in obvious jest, the defendant who uttered them is not liable. The following case was referred to for this proposition: *Mohamed Azwan bin Hj Ali v Sistem Televisyen (M) Bhd & Ors* [2000] 4 MLJ 120 p 127 ; [2000] 7 CLJ 498 at pp 498, 504–505:

E Held (3) Words, which on the face of them, are obviously defamatory may not be so because of the circumstances under which they are published. They may be spoken in jest, and so understood by anyone who hears them (*Willows v Williams*). When spoken in obvious jest, the person uttering them is not liable (*Glass v Perl*) ... (at p 504-505).

F ... As public personalities they must accept the 'buffets and blows' that come with fame. The critical comments that they face must be accepted with equal composure, as the accolades that they love so much to hear. In *Warren v Green* [1958] DLR 255 Cairns J referred to the speech of Egbert J in *Willows v Williams* [1951] 2 WWR (NS) 657 at p 659 wherein His Lordship said:

G Words which are on their face obviously defamatory may not be so because of the circumstances under which they are published. For example, they may be spoken in jest, and so understood by anyone who hears them.

H It is pertinent to refer to the words of Solomon J in *Glass v Perl* [1929] TPD 264: When words which on the face of them are defamatory, are spoken in obvious jest, the person uttering them is not liable.

I It is my judgment therefore that since the programme 'Melodi' in itself is a light entertainment programme as admitted by the plaintiff's own witness, then the said words as are alleged to be defamatory as uttered by the fourth defendant, are to my mind, words spoken in jest and therefore, not defamatory of the plaintiff. As said by the Court of Appeal in *Chok Foo Choo v The China Press Bhd* [1999] 1 CLJ 461 at p 466:

It cannot, I think, be doubted that the First task of a court in an action for

defamation is to determine whether the words complained of are capable of bearing a defamatory meaning. And it is beyond argument that this is in essence a question of law that turns upon the construction of the words published.

A

As I said in *Ratus Mesra Sdn Bhd v Shaik Osman Majid & Ors* [1999] 3 MLJ 529:

... the test to be applied when considering whether a statement is defamatory of a plaintiff is an objective one in that it must be given a meaning in which a reasonable man would understand it and that for this purpose it is necessary to consider the whole article.

B

Fair comment

C

[107] The defendant alternatively relied on the defence of fair comment.

[108] Section 9 of the Defamation Act 1957 provides as follows:

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In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.

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[109] According to counsel, the defence of fair comment is available to the defendant as the matter involves public interest as the plaintiff is an active politician. The plaintiff also previously held public office. He was a former councillor of the Penang Island Municipal Council (1990–1995 and 2009–2011) and a former State Assemblyman of Penang for two terms (1995–1999 and 1999–2004).

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[110] The plaintiff did not deny that he had jumped from party to party since 1999. Also, the plaintiff clearly invited public comment by publicly announcing his quitting of PKR and in the process publicly attacked PKR and DAP. It is submitted that any matter brought before the public to invite public criticism may be commented upon. In this regard, reference was made to *Mohamed Azwan bin Hj Ali v Sistem Televisyen (M) Bhd & Ors* [2000] 4 MLJ 120 at p 128; [2000] 7 CLJ 498 at p 506 where it was held ‘... The plaintiff clearly invited public comment by his public announcement of his intention to propose marriage to Ziana Zain. Any matter brought before the public so as to invite public criticism may be commented upon (per Barry JP in *Payne v Sheffield* [1882] 2 EDC 166).’

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[111] Thus the labeling of the plaintiff as a ‘political frog’ by the defendant is fair comment based on the true facts that the plaintiff jumped from one political party to another, the latest being from PKR to GERAKAN.

A [112] The above words and/or words contained in paras 6–10 of the statement of claim, if and to the extent that they have the meaning as alleged in para 15, in particular 15(o) and (p), are expression of opinion and fair comment that the plaintiff is a politician who is prone to jumping from one political party to another. The said conduct and behaviour of the plaintiff as a politician who also holds various positions as stated in paras 3, 11–14 and 20–21 of the statement of claim are certainly of public interest. The plaintiff's own action and behavior in jumping from one political party to another had already created less than good reputation for himself even without the statements being made by the defendant.

D [113] It was submitted that there was no malice on the defendant's part in uttering the words complained of. There was no evidence that the defendant has any motive to injure the plaintiff's reputation. There was also no proof of any previous bad blood between the plaintiff and the defendant.

E [114] The defendant did not fire the first salvo that led to this matter. It was the plaintiff who first publicly accused DAP of oppressing and bullying PKR, and wanting to wrestle PKR's state assembly seats in Penang. All these allegations were proven to be fabricated and false in the 2013 General Election when the number of seats contested by PKR was the same as that of the 2008 General Election.

F [115] Counsel emphasised that the defendant never once on his own initiative made any public announcement or took to the press to denounce the plaintiff. Instead, it was the plaintiff who repeatedly made statements to the press. It was only after the plaintiff's press statements that the reporters telephoned the defendant for comment.

G FINDINGS OF THE COURT

H [116] In a defamation action, the context and circumstances in which the words were uttered are important and imperative. Words, particularly in a defamation action cannot be read in isolation but must be viewed in the context and against the circumstances in which they were uttered.

I [117] Counsel for the plaintiff agreed that the task of the court is not to look at each of the impugned articles in isolation but to look at them as a whole and to construe the words contained therein accordingly. As for each of the individual articles, the impugned words therein cannot be looked at in isolation but must be construed against the backdrop of the article in its entirety.

[118] My first impression of the article which appeared in the *Kwong Wah Yit*

Poh on 18 December 2011 (pp 23–26 Bundle B) is that it is not entirely clear as to how the words ‘katak politik’ (p 26 Bundle B) crept into the said paragraph. When pressed for an explanation, counsel for the plaintiff suggested that it may have come from the plaintiff when he was interviewed by the reporter.

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[119] That puzzled me in that it would be curious for the plaintiff to use the word on himself especially when he took particular umbrage to that word which he said was tantamount to character assassination.

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[120] In response to my query, counsel for the plaintiff said that perhaps the reporter posed the question to the plaintiff; ‘what if people call you political frog?’ Of course that is a possibility.

[121] But at the same time, it is also possible or even probable that the defendant, who maintained that he was interviewed over the phone, may have been the one who called the plaintiff a ‘political frog’. which led the reporter to convey this to the plaintiff.

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[122] But rather unfortunately the reporter Chew Shen Tong was not called to testify by either side.

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[123] But as lamentable as it may be, I do think that as the protagonist of the suit, it was the plaintiff’s primary duty to call the reporter to firmly establish who exactly used the words ‘political frog’ and how it came into the sentence that was reproduced in p 26 of Bundle B. Otherwise it would be a matter of pure speculation.

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[124] This is all the more pressing and imperative, when we take into consideration the defendant’s stand that he used the words ‘political frog’ on the plaintiff and that he could not control the reporter if he proceeded to use a redacted form of the words that were originally uttered by the defendant. The impression that I get from the impugned para at p 26 Bundle B, which reads as:

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Mengenai percakapan dalam temubual Lim Boo Chang dalam ‘Bilik Kuliah Pedas’ yang mengatakan beliau sebagai ‘katak politik’ merupakan pembunuhan perwatakan terhadap beliau, Ng Wei Aik yang pernah berkata bahawa Lim Boo Chang merupakan katak juga tidak kisah langsung, dan bercakap dengan terus-terang bahawa Lim Boo Chang telah tidak mempunyai perwatakan manusia lagi, manalah terdapatnya pembunuhan perwatakan manusia ...’. is that the defendant had previously used the word ‘katak’ on the plaintiff. So the question is whether the defendant previously used the word ‘frog’ or ‘political frog’? Only the reporter can shed light on this.

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- A [125] As such, any discussion on this would be purely speculative. But based on the material before me, I am more inclined to the view that it is more likely and indeed probable that it was the defendant who used the words 'political frog' which was repeated and posed as a question by the reporter to the plaintiff and in the later part of the article the word 'political' was dropped off.
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- C [126] In this regard, I gathered from the explanation given by counsel for the plaintiff that his position now is that the words 'political frog' or 'frog' if they were used to imply that the person was a political party hopper then, in the Malaysian political context, which has given rise to politicians metaphorically having amphibian characteristics of leaping or jumping from one political party to another, that *per se* is not actionable.
- D [127] On that score both counsel are in agreement. But their agreement ends there. It is the plaintiff's case that the defendant called, intended to call and did call the plaintiff a frog in the animal sense and not in the human sense (ie 'political frog'). The plaintiff's stance in this regard is based primarily on the use of words, 'frog with no human character'.
- E [128] In my view, in the Malaysian political context and the propensity or tendency of some politicians to hop or leap from one party to another, the label 'political frog' or 'frog' is not actionable as there is no imputation other than that the individual is a party hopper, which as a fact is true in this case.
- F
- G [129] Of course during the interview, the plaintiff said that if anyone calls him 'political frog' then that would amount to character assassination but that is just his own view. In law, the label 'political frog' or 'frog' is merely a label or moniker to describe the act of a politician who has jettisoned his political party and joined another party which is usually (but not always) in opposition to the first party.
- H [130] So the question is, if the defendant did not use the words 'political frog' in his interview with the reporters and merely used the words 'frog with no human character', whether those words would imply or be reasonably be understood as meaning that the plaintiff was an amphibian as opposed to a human being. In this regard, it is appropriate in my view to recall what was said by Lord Selborne LC in *The Capital and Counties Bank, Limited v George Henty & Sons* (1882) 7 App Cas 741 at p 745:
- I The test, according to the authorities, is, whether under the circumstances in which the writing was published, reasonable men, to whom the publication was made, would be likely to understand it in a libelous sense.

[131] It is apposite to remind ourselves that the gravamen of the plaintiff's complaint in this action is that from 17 December 2011 onwards, the defendant outrightly and repeatedly called the plaintiff a 'frog without human character'. The plaintiff's complaint is that the defendant repeatedly used the word 'frog' and 'no human character'. The plaintiff emphasised that the defendant did not at all use the word 'political frog'. Further, in the context of the repeated use of the words 'frog', 'no human character' and 'how can a frog issue a legal notice' without any reservation, the words used by the defendant cannot be about any politician or any 'political frog' because a 'politician' or a 'political frog' has to be a human being.

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[132] According to the plaintiff, the defendant was not saying that the plaintiff was a politician who hopped from party to party and that the defendant repeatedly and outright ridiculed the plaintiff as a 'frog without human character'.

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[133] As was rightly pointed out by counsel for the defendant, there is no rhyme or reason for the defendant to use the words 'frog' other than for the purpose of conveying that he hopped from one political party to another. He could have but did not use other labels or pick other species of animal from the animal kingdom but confined himself to 'frog'.

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[134] Looking at all the circumstances, it is clear to me that as a matter of probability and plain logic, the defendant did not call the plaintiff an animal but a 'frog with no human character' which at worst means a politician with no human character. Thus, taking into account the context in which it was said, to construe the words 'frog' and/or 'frog with no human character' as meaning an animal would in my view be an interpretation which would be in defiance of logic and common sense. It would be stretching the interpretation of the words beyond the boundary of reasonableness.

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[135] I will now touch on justification. The defendant had indeed pleaded justification. In this regard, the defendant's evidence was that the plaintiff was a party hopper and he had to repudiate what the plaintiff was saying when had disparaged his party, DAP and made or fabricated excuses for his departure from PKR. As was rightly pointed out by counsel for the defendant, there was no evidence of any previous animosity between the plaintiff and the defendant. And so it is not as if the defendant had any axe to grind with the plaintiff.

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[136] The reasons which the plaintiff gave for leaving PKR, that is, that DAP was bullying PKR were, according to the defendant is a spurious one. In fact, in the Kwong Wah Yit Poh article, the defendant had actually been quoted as saying that the plaintiff had 'fabricated facts'. At p 25 Bundle B, the defendant is quoted as having said, under the sub-title; *Ng Wei Aik: Mereka Fakta* '...

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A *semua ini rekaan fakta Lim Boo Chang.*

[137] I would have thought that if anything the plaintiff should have taken umbrage with those words which carried very serious and damning imputations. But this action is not about those pejorative words which are inherently injurious to one's reputation. Yet, those words do not seem to have affected the plaintiff.

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[138] As the plaintiff has chosen not to premise his case on those words, I have no choice but to accept the invitation of counsel for the defendant to conclude that whatever that was uttered by the defendant in that regard, that the plaintiff had fabricated facts as an excuse to leave PKR, is true.

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[139] In those compelling circumstances and given the imperative and urgent need for the defendant to defend his party as a result of the plaintiff publicly disparaging the DAP and sowing the seeds for a rift between DAP and PKR, the question is can it reasonably be said that the defendant was not entitled to defend the DAP from the plaintiff's disparaging remarks about the party. To me the answer is obvious, in that the defendant was not only entitled to but was impelled to defend his party from spurious allegations.

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[140] If anything it is those words which explicitly suggest that the plaintiff had fabricated facts which are prima facie defamatory of the plaintiff. But the plaintiff has chosen to be inert, passive and untroubled by those truly damning words uttered by the defendant and published by *Kwong Wah Yit Poh*.

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[141] As was stated by the defendant in his witness statement, when he spoke to the reporter from *Kwong Wah Yit Poh*, Mr Chew, he commented that the plaintiff was a 'political frog'. As I said, the reporter would have been the best person to shed light on this.

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[142] But in any event, as I have concluded that it makes no difference whether a politician is called a 'political frog' or a 'frog', nothing therefore turns on this point about 'political frog' or 'frog'. It means the same thing. It is a mere label to denote the party hopping proclivity of a politician. Labels are inevitable. And so for example, if a person frequently changes jobs or vocation or moves from one place to another then that person will earn the label 'a rolling stone gathers no moss' which carries the (uncomplimentary) meaning that that person is always moving, with no roots in one place and avoiding responsibilities. Similarly, in Malaysia a politician who keeps changing political parties is usually called 'political frog or frog', which is a mere benign moniker or label which is not actionable in defamation.

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[143] Thus, the impugned words must be seen in the context in which they

were said and the occasion and circumstances in which the defendant uttered those words. It is not the plaintiff's subjective perception that matters but rather it is the impact that it would have on the mind of a reasonable man who is not averse to scandal, that matters. This is exactly where societal standards, and norms will come into play in the overall objective assessment in order to determine whether the impugned words are capable of the defamatory meanings which the plaintiff says it has. The test in this regard was clearly and lucidly explained by Lordship Harinder Singh JC (as he then was) in *Dato Seri Anwar Ibrahim v New Straits Times Press (M) Sdn Bhd & Anor* [2010] 2 MLJ 492, where at p 503 His Lordship said:

The defamatory nature of an imputation also cannot be judged in isolation. It has to be ascertained by reference to the moral or social standards of society generally. This is an important part of the consideration of what constitutes defamatory matter. Such societal standards are not amenable to evidentiary proof. It will be up to the judges to consider the requisite standards when determining whether a matter is either capable of being defamatory or is in fact defamatory.

[144] Accordingly, applying that test, I am impelled to the view that the words 'frog' or 'frog with no human character' or 'political frog' merely conveys to the reasonable minded Malaysian that the plaintiff is a political party hopper. Most certainly the reasonable minded Malaysian will not conclude that the defendant was calling the plaintiff an animal.

[145] It is obvious enough that the plaintiff brought this entire episode upon himself by leaving PKR (which he is legally and constitutionally entitled to do) and speaking to reporters and predicating his departure on reasons which have turned out to be spurious.

[146] For completeness, I will touch on the point about the impugned statements being made in jest. In this regard, the defendant said that whatever he said to the reporters about the plaintiff being a 'frog' and having no human characteristics was said in jest.

[147] In his submissions, counsel for the plaintiff said that none of the reporters laughed when the plaintiff was called a 'frog' or 'frog with no human character'. My question is how did the plaintiff know that the reporters did not laugh at what the defendant describes as a statement made in jest? These were all done by way of telephone conversations between the defendant and the reporters. At any rate, the plaintiff was not present when the defendant spoke to the reporters. The defendant said that he spoke in jest. If the plaintiff says otherwise, then surely he should have called the reporters to repudiate the suggestion by the defendant that it was said in jest.

A [148] Of course, counsel for the plaintiff has rightly pointed to various parts of the articles that were published that make it unlikely that the statements were made in jest. Again, I think that the reporters should have been called to shed light on whether they thought the defendant spoke in jest or was serious about the statements that he made.

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C [149] In this regard, it is I think relevant also to take into account the evidence given by Encik AR Amiruddin, a retired journalist ('DW1') who said that, 'calling a politician a 'political frog' itself does not carry negative connotation unlike calling him or her a rat or snake. Whether or not it carries negative connotation will depend on the motive or reason of his or her party-hopping act.'

D [150] Further, in response to the question, 'would you say a person, the plaintiff in this case, is a 'frog' and 'possess no human trait because of the words or phrases complained thereof?' he said, I would say no'. The term 'frog' mentioned there is clearly a second mention of the phrase 'political frog'. It must be referring to the phrase 'political frog' but shortened. I would definitely not think that Mr Lim Boo Chang is not a human being when he was called a 'frog'. I see it being said in jest or in mockery only by Mr Ng Wei Aik'.

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F [151] DW1's views on the matter are not unimportant and are in my view, very much reflective of the perception that is created by the impugned statements. As DW1 said, it merely conveys that the person is a party hopper and that it is very much construed as something said in jest.

G [152] Much was said about the defendant being actuated by malice and spite. In this regard, I find firstly that there is no evidence of the defendant having any vendetta or axe to grind with the plaintiff.

H [153] Secondly, the occasion on which the defendant uttered was one where he had to legitimately rise up to the occasion and defend his party, DAP which was being maligned by the plaintiff. I do not see such conduct as a manifestation of malice.

I [154] It shows that he had to do it out of necessity so as to disabuse the perception created by the plaintiffs public statement that DAP was bullying its partner in the opposition coalition.

[155] As such, there was or could have been no intention to do harm to the plaintiff but was instead done to prevent harm inflicted onto DAP in particular and the opposition coalition in general.

[156] As I said, looking at the circumstances and the occasion on which it was uttered to the reporters, there is more than a distinct possibility that the words used were said in jest. A

[157] In any event, as I have already concluded that the impugned words are not capable of having the defamatory meanings or imputations as suggested by the plaintiff, I find it unnecessary to say anything more about the point about the statements being made in jest. Also, because of the conclusion that I have reached as stated above, I find it unnecessary to deal with all the other points in this case such as justification or fair comment. However, it is my view that the impugned words which are said to be defamatory of the plaintiff are such that justification and/or fair comment do not arise for consideration. B
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[158] For the sake of completeness and assuming for a moment that I was wrong in my ruling as regards the absence of any defamatory meaning or imputation by the use of the impugned words, then (had the plaintiff succeeded on liability) the quantum of damages that I would have awarded would be RM75,000 as the plaintiff is by no means a politician at the national level and is more akin to a regional or state politician and so comparatively he should be awarded a sum which is commensurate with that limited political status. D
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[159] At any rate at the material time of the impugned publication the plaintiff was not an office bearer in any political party or a State Assemblyman or Member of Parliament. And so I am of the view that if the plaintiff had succeeded in this action the damages payable would be RM75,000. F

THE OUTCOME

[160] For the reasons that I have discussed above, I am hereby ruling that the plaintiff has failed to prove that the impugned words in the relevant newspapers and online articles bear or are capable of having the defamatory meanings or imputations as pleaded by the plaintiff in the statement of claim. G

[161] Whilst the impugned words are certainly not complimentary of the plaintiff, they are on the other hand not defamatory either. H

[162] The plaintiff's claim against the defendant is dismissed. The plaintiff is to pay to the defendant costs in the sum of RM30,000. I

A *Claim dismissed.*

Reported by Afiq Mohamad Noor

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